1997

Norma Campbell, Lamont Campbell, and The Campbell Cattle Company, a Utah general partnership, Plaintiffs/Appellees vs. Box Elder County, Defendant/Appellant: Box Elder County, Third Party Plaintiff/Appellant, vs. Norma Campbell, Lamont Campbell, the Campbell Cattle Company, a Utah general partnership, Paul D. Barnes, Evelyn Barnes, Coleen Barnes, Eldon M. Barnes, Wanda Barnes, Burke Heaton, and The Heaton Limited Family Partnership, Third Party Defendants/Appellees : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH

NORMA CAMPBELL, LAMONT CAMPBELL, and THE CAMPBELL CATTLE COMPANY, a Utah general partnership, Plaintiffs/Appellees	
vs.	Case No. 970587-CA
BOX ELDER COUNTY, Defendant/Appellant	Priority No. 15
BOX ELDER COUNTY, Third Party Plaintiff/Appellant,	
vs.	
NORMA CAMPBELL, LAMONT CAMPBELL, THE CAMPBELL CATTLE COMPANY, a Utah general partnership, PAUL D. BARNES, EVELYN BARNES, COLEEN BARNES, ELDON M. BARNES, WANDA BARNES, BURKE HEATON, and THE HEATON LIMITED FAMILY PARTNERSHIP, Third Party Defendants/Appellees.	

BRIEF OF APPELLANT

APPEAL FROM A DECISION OF THE
FIRST DISTRICT COURT, BOX ELDER COUNTY
HONORABLE BEN H. HADFIELD

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STATEMENT OF JURISDICTION

The Court of Appeals has jurisdiction in this matter pursuant to Section 78-2(a)-3(h), Utah Code Annotated 1953, as amended.

STATEMENT OF ISSUES PRESENTED

POINT I

THE COURT ERRED BY FINDING THAT THE RIDGE ROAD WAS USED SOLELY FOR THE PURPOSE OF RECREATION AND USING THAT FINDING AS A BASIS FOR CONCLUDING THE ROAD WAS NOT A PUBLIC THOROUGHFARE.

The Court's failure to acknowledge in its decision the fact that the Ridge Road was used for numerous purposes, including recreation, created an inequitable result for members of the general public who desire to use the road as access to the Sawtooth National Forest. Furthermore, even if the Ridge Road had been used solely for recreational purposes, the court cited no statute or case law supporting its position that recreational use alone is not sufficient to establish a public roadway.

POINT II

THE COURT ERRED IN ITS DETERMINATION THAT EVEN THOUGH THE RIDGE ROAD HAD BEEN USED IN EXCESS OF TEN YEARS, THE USE WAS NEITHER CONTINUOUS NOR AS A PUBLIC THOROUGHFARE.

The Ridge Road is inaccessible during the months of November through April, and sometimes until June, due to snow and water conditions on the road. The Court committed error when it concentrated solely on the use of the Ridge Road during the deer hunt season and failed to consider road use testimony during other times of the year.

POINT III

THE COURT ERRED IN CONSIDERING THE LANDOWNER'S INTENT.

According to current law, the landowner's intent regarding the status of the road is irrelevant. Thurman v. Byram, 626 P.2d 447 (Utah 1981).

POINT IV

THE COURT ERRED BY FAILING TO CONSIDER THE LACK OF ASSERTION OF OWNERSHIP OF THE ROAD BY THE LANDOWNERS, ESPECIALLY BARNES AND HEATON.

The stipulation between the parties was that there were only two locked gates on the entire road during the relevant period, and they were not always locked. These two gates were on the Campbell property; there were never any locked gates on the Barnes and Heaton properties during the relevant period. Testimony presented by Defendant/Appellant ("Appellant") indicated that no witnesses observed a locked gate blocking the Ridge Road during the times they wished to access the Sawtooth National Forest.

POINT V

THE COURT ERRED BY FAILING TO CONSIDER ABUNDANT TESTIMONY REGARDING THE PUBLIC'S UNDERSTANDING REGARDING USE OF THE RIDGE ROAD AND THE CONCOMITANT PUBLIC USE OF THE RIDGE ROAD.

The public understanding regarding the Ridge Road was that it was not only an access point to the Sawtooth National Forest but that it was the *best* access to National Forest Service property. Additionally, because of the public perception of the purpose of the Ridge Road, the road was continuously used as a public thoroughfare.

POINT VI

THE COURT ERRED BY FAILING TO CREATE A RIGHT OF PUBLIC ACCESS OVER THE RIDGE ROAD FOR THE DEER HUNTING SEASON.

It was clearly established and stipulated that the road was open to the public and used by the public during the general deer hunt each year for a period of time well in excess of ten years. The Court refused to create a public right of access for that period of time each year.

The applicable standard of review regarding the factual issues is whether or not the Court's findings are consistent with the evidence presented, and whether the trial Court abused its discretion in finding those facts. The applicable standard of review regarding legal conclusions included in the issues presented above is whether or not the trial Court reached proper and allowable legal conclusions, assuming that the factual findings were supportable. The trial Court is granted substantial discretion regarding factual findings, but the trial Court's findings must be supported by the evidence presented at the trial.

The Trial Court abused its discretion and/or erred in its interpretation of Section 27-12-89 Utah Code, by failing to apply that statute properly under the facts and circumstances in this case, or by failing to interpret the statute properly.

RECITATION OF THE STATUTES INVOLVED

Section 27-12-89:

> "Public use constituting dedication.
> A highway shall be deemed to have been dedicated and abandoned to the use of the public when it has been continuously used as a public thoroughfare for a period of ten years."

Section 27-12-90:

> "Highways Once Established Continue Until Abandoned.
> All public highways once established shall continue to be highways until abandoned or vacated by order of the highway authorities having such jurisdiction over any such highway, or by other competent authority."

Section 27-12-2(6):

> "Highway means any public road, street, alley, lane, court, place, viaduct, tunnel, culvert, bridge, or structure laid out or erected for public use, or dedicated or abandoned to the public, or made public in an action for the partition of real property, including the entire area within the right-of-way."

Section 27-12-138:

> "Obstructing traffic on sidewalks or highways prohibited.
> (1)...
> (2) Vehicles, building material, or other similar things may be placed temporarily on highways in a manner that will not impede, endanger, or obstruct ordinary traffic, but no vehicles, building material, or other obstructions are permitted to remain on any highway contrary to instructions from the highway authority having jurisdiction over the highway."
> (emphasis added)

Section 27-12-138.5:

> "Gates on B system county highways.
> (1) The county executive of any county may provide for the erection and maintenance of gates on the B system county highways in order to avoid the necessity of building highway fences.
> (2) The person for whose immediate benefit the gates are erected or maintained shall in all cases bear the expense of such erections and maintenance.

(3) Nothing contained in Section 27-12-138 shall be construed to prohibit any person from placing any unlocked, nonrestrictive gate across any B system county highway, or maintaining the same, with the approval of the county executive of that county.
(4) No gates shall be allowed on any B system county highways except those gates allowed by the county executive in accordance with the provisions of this section, If the expense of the erection and maintenance of such allowed gates is not paid or if any lock or other device is placed upon such gates so as to make them restrictive, the county executive of that county shall notify the responsible party that their approval is terminated and the gate shall thereafter be deemed to be any obstruction pursuant to Section 27-12-138.
(5) No placement of gates with the consent of the county executive across B system county highways nor the maintenance thereof for the statutory period of time shall constitute nor establish an abandonment by the county or any easement on behalf of the person establishing such gate.
(6) Any person committing any of the following acts shall be guilty of a class B misdemeanor and, in addition, shall be liable for any and all damages suffered by any party as a result of such acts:
(a) leave open any gate, erected or maintained pursuant to this section;
(b) unnecessarily drive over the ground adjoining the highway on which such a gate is erected;
(c) place any lock or other restrictive device on such a gate; or
(d) violate any rules or regulations of any county legislative body relating to such gates within the county.
(7) The provisions of this section relating to maintenance and removal of gates over B system county highways shall be deemed to apply retrospectively to all such gates in existence on the effective date of this act." (emphasis added)

Section 27-12-25:

"Control of highways, roads, paths, and ways not otherwise designated.
All highways, roads, paths, and ways not designated as a federal, state, city, or special highway, road, path or way shall remain under the direction of the county executive in the county where they are located."

Section 27-12-26 provides as follows:

"County executive to keep plats of roads and highways. It shall be the duty of the county executive of each county to determine all county roads existing in its county, outside its cities and towns, and to prepare and keep current plats and specific descriptions of the same and of such other highways as he may from time to time locate upon public lands, which shall be kept on file in the Office of the County Clerk or Recorder." (emphasis added)

NATURE OF THE CASE

This is an appeal from a two-part judgment, in the form of a Memorandum Decision, dated July 1, 1997, and a subsequent "Decision and Order Clarifying Ruling", dated September 16, 1997. Two Notices of Appeal were filed, the first dated July 29, 1997, the second dated September 22, 1997. The September 22, 1997 Notice of Appeal, as stated therein, was not intended to create a separate appeal. The matter should be considered as a single appeal, with the September 22, 1997 notice filed merely to assure the preservation of the appeal on both orders.

DISPOSITION IN THE COURT BELOW

The Memorandum Decision issued by Judge Hadfield on July 1, 1997, discussed only the Campbell portion of the roadway, and concluded that the Ridge Road was not dedicated and abandoned to Box Elder County, for the reasons cited therein. The September 16 decision and order clarified and expanded the Court's earlier ruling, making it clear that the Court's conclusions and findings

applied to the entire Ridge Road, including the Barnes and Heaton portions.

STATEMENT OF FACTS

Campbells filed suit in approximately late September or early October 1996, seeking a Court declaration that a road across Campbell property was a private road. Defendant Box Elder County had previously claimed that the road was public.

Campbells also sought a preliminary injunction, and a hearing was held thereon immediately prior to the October 1996 general deer hunting season. Substantial testimony was taken, over two days, and the Court granted the public the right to use the roadway for the general deer season of 1996, denied public access for any other times, and ordered the matter set for trial at a later date.

The roadway in question runs across Campbell property, Barnes property, Heaton property, and U.S. Forest Service property, over a length of many miles.

Thereafter, Box Elder County filed its Third-Party Complaint, naming the Campbell's as third-party defendants, and bringing in the owners of the Heaton and Barnes properties, seeking a declaration that the entire road was public, thus expanding the focus beyond the Campbell property to all of the private property owners along the entire length of the roadway.

At trial, held on May 30, 1997, based on earlier suggestions of the Court, the parties stipulated that a transcript of the

preliminary injunction hearing would become the trial record, along with the testimony of any other witnesses heard on that date.

The parties also stipulated to other matters, including the fact that the only locked gates along the entire length of the roadway prior to 1994 were the Campbell property gates; no gates on the Barnes and Heaton properties were ever locked prior to that date.

The Trial Court's July 1, 1997 decision held the Campbell portion of the road to be private property, but did not make any findings, conclusions, or orders directly dealing with the Barnes and Heaton properties.

The Judge's clarification decision, dated September 16, 1997, held the road over the Barnes and Heaton properties to be private property also, for the reasons stated in the July 1 decision, in spite of the essential factual difference between the two sections of road.

The Campbell property is located at the base of a mountain range containing Sawtooth National Forest lands. The road in question commences (or ends, as the case may be), on Campbell property at a point where that property joins with what is agreed by all parties to be a public, county roadway. Actually, there are two such points on the Campbell property, about a mile apart, the southern-most of which was referred to throughout the hearings as the "Scoffield access", or the "southern access". (Appendix #1) The northern access was referred to throughout as

either the "Campbell access", or the "northern access". (Appendix #4). Of the two, the Scoffield access appears to have been used more heavily, especially during the general deer hunt. Attached hereto as an appendix is a downsized copy of defendant's Fxhibit One, which was used throughout all hearings as the basic reference map. The numbering thereon is enhanced so the numbers are visible. The original is part of the Record on Appeal.

It is important to note that although these are referred to as accesses, they may also be referred to with equal ease as exits.

Both the Scoffield and the northern access come together (Appendix #7) within one-half mile from their respective junctions with undisputed county roads. From that point, the balance of the so-called Ridge Road, as it's name implies, proceeds along a ridge through Barnes property, then through Forest Service property, then through interspersed Forest Service and Heaton property, to more Forest Service property on the top of the mountain range. The road runs uphill from the Campbell property, and downhill from the top of the mountain to the Campbell property.

From the Forest Service property on top of the mountain, going a different direction, is an access or exit referred to as "one mile" in the proceedings, which is an undisputed public roadway.

The Ridge Road is impassable by vehicular traffic from approximately November through approximately April, and in wet

years sometimes remains impassible until June, due to the snow and water conditions. Therefore, the primary opportunity to use the road for vehicular traffic occurs from approximately June through October of each year.

Beyond (uphill from) the point where the Scoffield and northern accesses come together, the road first began as a seasonal sheep track, some time in the 1930's or 1940's.

In the mid-1950's, the Scoffield access portion of the roadway was used for quarrying operations. (The quarry is #3 on the Appendix.)

The road originally ran only a few miles, through the Campbell and Barnes property and onto Forest Service property, to a sheep camp (Appendix #5). The road existed to this point from some time in the 1930's or 1940's. In the early or mid-1960's, or earlier, the road was established as it presently exists, and the Forest Service did some maintenance work in the 1960's on public and private property portions of the roadway, building water bars to divert runoff water from the road itself, thus preventing washouts.

It should also be noted that between the upper Barnes parcel (there are two of them) and the lower Heaton parcel approximately three miles of the road traverses Forest Service ground. (See Appendix, beyond #5, where the road crosses from Section 3 to Section 10.)

The Scoffield access was generally unlocked during any

period of the year until 1994 (testimony of LaMont Campbell, Record, page 244). The Trial Court mistakenly found the opposite to be true in its July 1, 1997 Memorandum Decision (Record, page 590).

In 1993 or 1994, Mr. Campbell erected a sign at or near the Scoffield access:

> "The public has abused its privilege of using the Ridge Road and property in the area. That's why it is closed." (Record, page 94, Defendant's Exhibit #5, photograph).

The Campbells produced witnesses who testified regarding Campbell's assertions concerning the Scoffield access and the Ridge Road.

Box Elder County produced witnesses who testified regarding their usage of the Ridge Road at various times of the year and for various purposes. Box Elder County proffered that other witnesses could be called, but the Court expressed a definite lack of interest in hearing any additional testimony from people who were using the road during the general deer season for deer hunting.

Box Elder County's witnesses testified that for a period of time far in excess of ten years and ending before 1994 they used the Ridge Road and never asked for permission, and they also testified that no signs were ever present and the gates were either not locked or simply did not exist.

Section 27-12-89 of the Utah Code, which appears in a chapter of the Utah Code entitled "Acquisition of Property for Highway Purposes", provides as follows:

"Public use constituting dedication.
A highway shall be deemed to have been dedicated and abandoned to the use of the public when it has been continuously used as a public thoroughfare for a period of ten years."

Section 27-12-90 provides as follows:

"Highways Once Established Continue Until Abandoned.
All public highways once established shall continue to be highways until abandoned or vacated by order of the highway authorities having such jurisdiction over any such highway, or by other competent authority."

The word "highway" is defined in Section 27-12-2(6) as follows:

"Highway means any public road, street, alley, lane, court, place, viaduct, tunnel, culvert, bridge, or structure laid out or erected for public use, or dedicated or abandoned to the public, or made public in an action for the partition of real property, including the entire area within the right-of-way."

Sections 27-12-21, 22 and 23 divide highways and roads into three categories: State Highways, which are called Class "A" Roads; County Roads, which are called Class "B" Roads; and City Streets, which are called Class "C" Roads. Section 27-12-22, referring to Class "B" Roads, provides that they are under the jurisdiction and control of county governing bodies of the respective counties, to be constructed and maintained by or under their authority.

Section 27-12-138 provides as follows:

"Obstructing traffic on sidewalks or highways prohibited.
(1)...
(2) Vehicles, building material, or other similar things may be placed temporarily on highways in a manner that will not impede, endanger, or obstruct

ordinary traffic, but no vehicles, building material, or other obstructions are permitted to remain on any highway contrary to instructions from the highway authority having jurisdiction over the highway." (emphasis added)

Section 27-12-138.5 provides as follows:

"Gates on B system county highways.
(1) The county executive of any county may provide for the erection and maintenance of gates on the B system county highways in order to avoid the necessity of building highway fences.
(2) The person for whose immediate benefit the gates are erected or maintained shall in all cases bear the expense of such erections and maintenance.
(3) Nothing contained in Section 27-12-138 shall be construed to prohibit any person from placing any unlocked, nonrestrictive gate across any B system county highway, or maintaining the same, with the approval of the county executive of that county.
(4) No gates shall be allowed on any B system county highways except those gates allowed by the county executive in accordance with the provisions of this section, If the expense of the erection and maintenance of such allowed gates is not paid or if any lock or other device is placed upon such gates so as to make them restrictive, the county executive of that county shall notify the responsible party that their approval is terminated and the gate shall thereafter be deemed to be any obstruction pursuant to Section 27-12-138.
(5) No placement of gates with the consent of the county executive across B system county highways nor the maintenance thereof for the statutory period of time shall constitute nor establish an abandonment by the county or any easement on behalf of the person establishing such gate.
(6) Any person committing any of the following acts shall be guilty of a class B misdemeanor and, in addition, shall be liable for any and all damages suffered by any party as a result of such acts:

(a) leave open any gate, erected or maintained pursuant to this section;
(b) unnecessarily drive over the ground adjoining the highway on which such a gate is erected;
(c) place any lock or other restrictive device on such a gate; or
(d) violate any rules or regulations of any county legislative body relating to such gates within the county.
(7) The provisions of this section relating to

maintenance and removal of gates over B system county highways shall be deemed to apply retrospectively to all such gates in existence on the effective date of this act." (emphasis added)

Section 27-12-24 provides that all actions involving determination of a priority of public use regarding highways and roadways not otherwise designated "shall be by the County Attorney under and by the direction of the County legislative body in which the so-designated way resides."

Section 27-12-25 provides as follows:

"Control of highways, roads, paths, and ways not otherwise designated.
All highways, roads, paths, and ways not designated as a federal, state, city, or special highway, road, path or way shall remain under the direction of the county executive in the county where they are located."

Section 27-12-26 provides as follows:

"County executive to keep plats of roads and highways. It shall be the duty of the county executive of each county to determine all county roads existing in its county, outside its cities and towns, and to prepare and keep current plats and specific descriptions of the same and of such other highways as he may from time to time locate upon public lands, which shall be kept on file in the Office of the County Clerk or Recorder." (emphasis added)

Note carefully that the basic statute concerning dedication, Section 27-12-89, provides that a highway is deemed to have become dedicated and abandoned to the public at the end of a continuous ten-year period, and not when someone goes to Court to make a claim. Also note that under Section 27-12-90, once a highway becomes established, it continues to be so established until abandoned or vacated by order of the highway authority.

Sections 27-12-102.1 through 27-12-102.5 deal with the process for vacating or abandoning county roads. Roads cannot be vacated or abandoned simply by non-use; the county executive (the County Commission in the situation of Box Elder County) must go through a formal process and take formal action. See Western Kane County Special Service District vs. Jackson, 744 P2d 1376 (Utah 1987), where the Supreme Court found that a roadway used by the public from 1919 to 1931 was still a public roadway more than 50 years later where no formal vacating had occurred, and even though the road had not been used for that entire period of time. Also see Kohler vs. Martin, 916 P2d 910 (Utah, 1996).

SUMMARY OF ARGUMENTS

1. The Court erred by stating that the Ridge Road was used solely for the purpose of recreation and by using that finding as a basis for refusing to create a public roadway.

2. The Court erred in its determination that even though the Ridge Road had been used excess of ten years, the use was neither continuous nor as a public thoroughfare.

3. The Court erred by considering the landowner's intent in determining whether the Ridge Road was dedicated to public use.

4. The Court erred by failing to consider the lack of assertion of ownership of the road by the landowners, especially Barnes and Heaton.

5. The Court erred by failing to consider abundant testimony regarding the public's understanding regarding use of the Ridge Road and the concomitant public use of the Ridge Road.

6. The Court erred by failing to create a right of public access over the Ridge Road for the deer hunting season.

ARGUMENT

POINT I

THE COURT ERRED BY FINDING THAT THE RIDGE ROAD WAS USED SOLELY FOR THE PURPOSE OF RECREATION AND BY USING THAT FINDING AS A BASIS FOR CONCLUDING THE ROAD WAS NOT A PUBLIC THOROUGHFARE.

Based upon testimony elicited at the preliminary injunction hearing and the May 30 hearing, there were thirty-six different usages of the Ridge Road. Although many of these pertained to hunting, other uses were established by the testimony.

1. Study of the effect of loco weed on cattle (Lynn James, Utah State University professor, (Record, page 621).

2. Collection of loco weed to take back for research purposes to the laboratory, (Record, page 630).

3. Observation of Cattle, (Record, page 630).

4. Quarrying operations, (Plaintiff's Complaint, Paragraph 6; Record, page 002).

5. Private seasonal sheep track, (Plaintiff's Complaint, Paragraph 5; Record, page 002).

6. U.S. Forest Service used the road so that their personnel could more easily access certain portions of Forest Service property to seed meadows on the mountains, (Plaintiff's Complaint, Paragraph 7; Record, page 002).

7. Box Elder County surveyor used it for county surveying work, (Record, page 232).

8. U.S. Forest Service would take their equipment and "stuff" up when needed, (Record, page 311).

9. People hauling wood to their farms, (Record, page 330).

10. Sheep camps, (Record, page 330).

11. U.S. Forest Service took drills up there and did a spraying job, (Record, page 346).

12. Installation of a big fence "up on top", (Record, page 355).

13. Took salt up there for the cows on top of the mountain, (Record, page 355).

14. U.S. Forest Service put water bars so people could make it up, (Record, page 336).

15. Pulled trailers up the road at one time, (Record, page 448).

16. Deer hunting, (Record, page 385).

17. Camping, (Record, page 386), (Record, page 423).

18. Spotting, (Record, page 386).

19. Coyote hunting, (Record, page 396).

20. Sightseeing, (Record, page 386).

21. Fishing, (Record, page 423).

22. Pine nut hunting, (Record, page 438).

23. Exploring, (Record, page 438).

24. Rattlesnake hunting, (Record, page 457).

25. Mountain lion hunting, (Record, page 467).

26. Prospecting, (Record, page 467).

27. Looking for plants, (Record, page 467).

28. Bobcat hunting, (Record, page 488).

29. Shooting pot guts, (Record, page 490).

30. Snowmobiling, (Record, page 490).

31. Scouting deer, (Record, page 490).

32. Bow hunting, (Record, page 491).

33. Sage hen hunting, (Record, page 511).

34. Pine hen hunting, (Record, page 513).

35. ATV riding, (Record, page 459).

36. Chicken hunting, (Record, page 251).

(In fairness, it should be noted that four of these uses relate to bird hunting, although perhaps different kinds of birds.)

Due to the plethora of uses, the Court's factual finding that the Ridge Road was used solely for recreation is unsupported by the testimony. Secondly, even if the road was used solely for recreation, the Court was unable to cite any authority supporting its conclusion that such use does not support a public dedication. Certainly, the relevant statute makes no distinction in the type of use necessary to create a public road. The trial court simply stated that "historically" Section 27-12-89 has been involved when a road was used for multiple purposes. (Record, page 595). Furthermore, the Court arbitrarily and without any basis in law or fact chose to lump together many types of uses under the heading "recreational"; logically, a dozen or more different recreational type uses could be considered "multiple" or "various" uses, i.e., snowmobiling, shooting, and scouting deer.

The Court cited no case law and there is none known to the undersigned to the effect that various recreational uses cannot establish public use. In fact, in Kohler vs. Martin, 916 P2d 910 (Utah 1996), the Court sustained a finding that a roadway used for recreational purposes was a public roadway, under Section 27-12-89.

POINT II

THE COURT ERRED IN ITS DETERMINATION THAT EVEN THOUGH THE RIDGE ROAD HAD BEEN USED IN EXCESS OF TEN YEARS, THE USE WAS NEITHER CONTINUOUS NOR AS A PUBLIC THOROUGHFARE.

The Court found that Box Elder County met its burden, by clear and convincing evidence, that the public had used the road for more than ten continuous years prior to 1994, but only during the general deer season. (Record, page 567). The Court then stated, "I have no authorities, and counsel both acknowledge to me that they can't find any, to say that I can identify a public way that only exists for a few days each year." (Record, page 567). The District Court erred in its factual finding that the use was only during the general deer season (See Point I). The court also erred in its legal conclusion that a public road cannot arise from seasonal use. First, this road is impassable,

as acknowledged by the District Court, for approximately seven months out of the year. (Record, page 590). Secondly, there was ample testimony that the road was used continuously by the public during the season when it was passable, not just during the deer hunt.

Mr. James Barnes stated that he used the Ridge Road "probably between ten and fifteen times" during the summer and fall. (Record, page 319). Alan Smart testified that he used the Ridge Road two or three weekends per month to camp during the summer. (Record, page 471-472). He also stated that he went coyote hunting from October to March for two or three weekends per month (Record, page 470). Alan Smart also testified that he used the road probably four or five times a year (Record, page 473-474). Brady Austin testified that he used the Ridge Road to hunt almost every weekend. (Record, page 489). Lynn James, a Utah State University professor, stated he performed his weekly collections and observations beginning in June and used the road about ten times each year through September. (Record, page 630).

The Trial Court erred when it determined that the Ridge Road's use was neither continuous nor as a public thoroughfare, given the above testimony, other testimony, and the fact that the road is impassable for approximately seven months out of the year.

Section 27-12-89, in requiring continuous use, means on a year-to-year basis. Even if the road is used less, or not at all, during certain seasons of the year, public use may clearly be established on a seasonal basis. See Jeremy vs. Bertagnole,

116 P2d 420, (Utah 1941), at page 424, where the Court stated:

> "True, such testimony does not reveal that any witness used the road at weekly, monthly, or even yearly intervals over a period of ten years; but from the evidence adduced, the inference is clearly a reasonable one that the road was used for the driving of cattle and sheep for a number of years in excess of that required, whenever it was necessary or convenient for the members of the public... to so use it."

The court upheld a trial court finding of a public roadway.

Also see Boyer vs. Clark, 326 P2d 107, (Utah 1958) at page 109, where the Court stated that:

> "..., the public even though not consisting of a great many persons, made continuous and uninterrupted use of Middle Canyon Road in traveling... as often as they found it convenient or necessary."

The court reversed a lower court finding that the roadway had not become a public road.

The logical extension of the Trial Court's reasoning that "continuous" means "all the time" has no end. Under such an interpretation, would the use have to be daily, or weekly, or would a car have to travel by every hour, every twelve hours, every twenty-four hours, or must the traffic be bumper to bumper?

The proper definition of continuous use may also be found in related law dealing with prescriptive easements, where the same issue arises in different context. In Richards vs. Pines Ranch, 559 P2d 948 (Utah, 1957) plaintiffs (the parties who were seeking to establish a private prescriptive easement) and their predecessors in interest had crossed the land of defendants for approximately forty years, using a rough road which was the subject matter of the lawsuit for purposes of getting to their property for the grazing of sheep, cutting of timber, taking of

Christmas trees, camping, picnics, horseback riding, and other such seasonal uses.

At the trial, the Judge dismissed plaintiff's Complaint, finding that the roadway had been used only sporadically, and therefore, that the evidence was insufficient to show the use was so regular, open, notorious, and continuous as to establish a prescriptive easement. The trial court also found that in recent years prior to the filing of the Complaint, the use had become permissive, more or less, and for these reasons dismissed the Complaint.

The issue on appeal was one of how much use must be made by the person claiming the easement. The Court's finding was that even a minimal use may establish a prescriptive easement.

> "It would seem that His Honor also erred in thinking that the adverse use had to be regular. All that is required is that the use be as often as required by the owner of the dominant estate." (Richards, p 959)

Continuing in Richards vs. Pines Ranch, again on page 959, the Court favorably quoted from a treatise on real property as follows:

> "The law is set out correctly in 1 Thompson on Real Property, Specific Easement, Section 464, page 575 (1924), as follows: A way may be established by prescription without direct evidence of its actual use during each year. A use may be continuous though not constant. A right-of-way means a right to pass over another's land, more or less frequently, according to the nature of the use to be made by the easement; and how frequently is immaterial provided it occurred as often as the claimant had occasion or chose to pass."

Also see Crane vs. Crane, 683 P2d 1062 (Utah 1984), where the court stated:

"A use need not be 'regular' or 'constant' in order to be 'continuous'. All that is necessary is that the use be as often as required by the nature of the use and the needs of the claimant." (p. 1064)

POINT III

THE COURT ERRED BY CONSIDERING THE LANDOWNER'S INTENT.

The Court erred when it stated:, "In addition, the Campbells' never intended that the Ridge Road be dedicated to the public use." (Record, page 594). According to current law, it is not necessary to prove the owner's intent Thurman v. Byram, 626 P.2d 447 (Utah 1981). See also Leo M. Bertagnole Inc. v. Pine Meadow Ranches, 639 P.2d 211 (Utah 1981).

The one and only requirement for establishing a road as a public roadway is that it be continuously used by members of the general public for at least ten years. See Thurman vs. Bryan, 626 P2d 447 (Utah 1981), Draper City vs. Estate of Bernardo, 909 P2d 225 (Utah 1995), Leo M. Bertagnole, Inc. vs. Pine Meadows Ranches, 639 P2d 211 (Utah 1981).

An early line of Utah cases, subsequently over-ruled, required evidence of intent by the landowner to dedicate the road, but allowed that intent to be inferred by declarations, acts, or circumstances and use by the general public. See Morris vs. Blunt, 171 P 1127 (Utah 1916); Gillmor vs. Carter, 391 P2d 426 (Utah 1964). In Thurman vs. Byram, "plaintiffs sought a determination that the road coursing through defendants' land had been used by the general public for a period in excess of ten years prior to defendants' installation of a gate blocking the

road in 1978 and that the road had thus become a public road." (page 448). The court held that "it is not necessary to prove the owner's intent to offer the road to the public.... Section 27-12-89 deems a dedication to the public as a matter of law when the required public use is established." (page 449)

Approximately ten months after deciding Thurman, the same court decided Leo M. Bertagnole, Inc. vs. Pine Meadows Ranches, 639 P2d 211 (Utah 1981). In Bertagnole, owners sought to quiet title to property including the first 500 feet of a road that was more than seven miles long. The owners contended that acquiescence in the use of land does not establish the necessary intent to dedicate property to the public use. The court held: "Such is not the law. There is no need to prove the landowner's intent." (p. 213)

POINT IV

THE COURT ERRED BY FAILING TO CONSIDER THE LACK OF ASSERTION OF OWNERSHIP OF THE ROAD BY THE LANDOWNERS.

If the Plaintiffs or Third-Party Defendants intended to show ownership of the road, they would have exercised ownership rights recognized by all who use the road. However, such was not the case. Even Lamont Campbell, the primary plaintiff in this case, by his own admission, stated that he never kicked anybody off "just for driving on the road." (Record, page 270). Lamont Campbell further stated that there was only one time, one year when the road wasn't opened about the last 30 or 40 years. (Record, page 279). Dean Barnes, another landowner, stated that

last year (1995) was the first year he locked his gate. (Record, page 301). Sam Ospital, who lived for years at the Scoffield access, testified that some years they've locked the gate and other years they haven't for the whole year. (Record, page 326-327). Larry Kempton testified that the forest service has never stopped the public from going up there. (Record, page 346). David Conger testified that he never asked for permission to use the road and had never seen a locked gate (Record, page 387-388). James Patterson never sought permission to use the road and never saw signs or a lock on any gate, even though he used the road from 1980-1989. (Record, page 398). Monty Jones never asked permission and never saw locked gates even though he used the road from the 1960s through 1979. (Record, page 425-426). Alan Burt, whose testimony is very compelling, stated that there were no locked gates on the Ridge Road until 1993. (Record, page 441-442). Allen Bourne never saw a locked gate. (Record, page 459). Brady Austin never encountered any locked gates nor obtained permission even though he used the road 15 times since 1989. (Record, page 491-493). Clayton Morrill never saw a gate locked for 10-15 years and never asked permission. (Record, page 538). Lynn James stated he never saw any signs saying no trespassing. (Record, page 628). David Hacking never experienced a locked gate and never saw a "no trespassing" sign. (Record, page 638-639). Finally, and possibly most importantly, the parties stipulated that prior to 1994 there were never any locked gates on the Barnes and Heaton sections of the road. Accordingly, most

of the testimony centered on the Campbell gates. (Record, page 648).

As earlier noted, Barnes and Heaton did absolutely nothing to assert ownership. In fact, neither of them even contended that they had ever locked any gates or done anything to interfere with public use before 1994.

Based upon this cumulative testimony, there is no question that the landowners, especially Barnes and Heaton, failed to assert any rights of ownership over the road and therefore the road was a public thoroughfare used continuously for at least ten years.

POINT V

THE COURT ERRED BY FAILING TO CONSIDER ABUNDANT TESTIMONY REGARDING THE PUBLIC'S UNDERSTANDING REGARDING USE OF THE RIDGE ROAD AND THE CONCOMITANT PUBLIC USE OF THE RIDGE ROAD.

The public's understanding regarding the use of the Ridge Road and their concomitant use of the road should be persuasive in determining if the road became dedicated to the public.

James Patterson testified "It's my understanding that the roads that are not purposefully blocked off are public roads; and that a lot of those public roads go across private land." (Record, page 407). Donald Peterson, an employee of the U.S. Forest Service, testified that he was not personally aware of any agreement that the Ridge Road would not become a public road. (Record, page 412). Alan Burt testified that he thought the Ridge Road was a county road. (Record, page 444). Alan Smart

testified that he knew the road went to forest service property. (Record, page 476). Brady Austin testified that he understood the public was allowed to go through the land because the road leads to National Forest service land. (Record, Page 495) . Larall Thompson stated that he felt like it was a road going up into the National Forest and he didn't feel like he needed permission. (Record, page 517). In addition to their understandings regarding where the Ridge Road led and how it was used, all of these witnesses personally used the Ridge Road as a public thoroughfare.

POINT VI

THE COURT ERRED BY FAILING TO CREATE A RIGHT OF PUBLIC ACCESS OVER THE RIDGE ROAD FOR THE DEER HUNTING SEASON

The Trial Judge, in his Memorandum Decision (Record, page 595), referred in a footnote to what he called a "time share model". Appellant argued at trial, and asserts on appeal, that continuous use means seasonal use, as discussed above in this brief, and that based thereon the road became dedicated to the public.

As an alternative, appellant argued at trial that even using the Court's findings, conclusions, and interpretations of the law, all provisions of the statute were met during the general deer season each year for the entire roadway, including the Campbell property. Therefore, the public should have a right of access during the general deer hunt, even if no public right of

access is created during any other time of year.

In the referenced footnote, the Court refers to this as a "time share model", and even states that while such a solution might be fair and equitable, the Court was not aware of any precedent.

Interestingly, the Court could not recite any precedent for its conclusion that solely recreational use does not create a public right-of-way.

Admittedly, there is no direct precedent in Utah for the public having a right-of-way two weeks out of the year and the roadway being private the balance of the time. It is respectfully submitted that no such precedent exists because use two weeks out of the year makes the road abandoned and dedicated to the public, under the facts and circumstances of this case. By the same token, no precedent exists prohibiting such a "time share".

By analogy, there <u>is</u> precedent for private easements to exist seasonally, or for limited times and limited purposes. See Point II above.

It is respectfully submitted that the public, like any individual or entity, could acquire a right of use for two weeks out of the year, during the general deer season. Nothing in the statute prohibits such an approach.

CONCLUSION

The Court erred by stating that the Ridge Road was used solely for the purpose of recreation. The great weight of testimony contradicts this finding. Even if the sole purpose was recreational, the statute and case law make no distinctions between types of uses, and the Court failed to cite any case law supporting its conclusions that recreational use cannot result in a dedication to the public. The Court erred in its determination that the public's use was neither continuous nor as a public thoroughfare. The testimony given by numerous witnesses supports the position that the use was continuous during those periods when the road was passable.

The Court erred by treating the Campbell portion of the roadway in the same manner as the Barnes/Heaton portion. The facts regarding the two sections are fundamentally different, compelling a finding that the Barnes/Heaton portion was always a public roadway.

The Court erred when it considered the landowner's intent. The Court also erred when it failed to consider the stipulated lack of assertion of ownership of the road by Barnes and Heaton, who did nothing to assert private ownership of the Ridge Road until 1994. However, that was after the time the Court found the public had used the road for ten years.

Finally, the Court erred by failing to consider the abundant testimony regarding the public's understanding of the Ridge Road and their concomitant use of the Ridge Road. The Ridge Road was

a road that was viewed by the public as a **public** road and their use mirrored that viewpoint.

In short, the public has met the statutory requirement of 27-12-89 because the public has used the road continuously as a public thoroughfare for a period of ten years. Therefore the highway shall be deemed dedicated and abandoned to the use of the public.

Appellants respectfully request this Court to reverse the Trial Court and direct that the entire road be declared public. As an alternative, the portion of the road that traverses the Heaton and Barnes properties should be declared public, even if the Campbell portion is not. Finally, as a last alternative, the entire road should at least be declared public during the general deer season.

DATED this 11th day of December 1997.

JON J. BUNDERSON
ATTORNEY FOR
DEFENDANTS/APPELLANTS

CERTIFICATE OF MAILING

I hereby certify that I mailed two (2) true and correct copies of Appellant's Brief, postage prepaid, this 11th day of December, 1997, to Appellees' attorney at the following business address:

Bruce R. Baird
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JON J. BUNDERSON

APPENDIX

ITEM

Copy of Defendant's Exhibit #1,
Map of Road and Area